Supreme Court, U.S.
FILED
MAR 10 2005
OFFICE OF THE CLERK

No. 041428

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

GERALD CREDEUR AND LINDA CREDEUR
PETITIONERS

VERSUS

M J OIL, INC., TRANSTEXAS GAS CORPORATION

AND NABORS DRILLING U.S.A., INC.
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals, Fifth Circuit, erroneously extend the scope of protection of the provisions of Chapter 95 of the Texas Civil Practice and Remedies Code to a non-property owner (Nabors Drilling U.S.A., Inc.) contrary to the intent of said statute and existing interpretations of same by Texas appellate courts?

2. Does the decision of the Court of Appeals, Fifth Circuit, erroneously expand the scope of what constitutes construction, repair, renovation or modification of property for purposes of Chapter 95 of the Texas Civil Practices and Remedies Code, thereby eradicating the plaintiff-appellants' common law premises liability rights and remedies available under established products liability law in the United States?

LIST OF ALL PARTIES TO THE PROCEEDING

The undersigned counsel of record for the plaintiff-appellants, Gerald Credeur and Linda Credeur, certifies that the following listed persons have an interest in the outcome of this proceeding in the United States Court of Appeals, Fifth Circuit, whose judgment is sought to be reviewed:

Gerald Credeur and Linda Credeur, plaintiff-appellants;

TransTexas Gas Corporation, defendant-appellee;

Nabors Drilling U.S.A., Inc., defendant-appellee

Donald G. Cave, Cave Law Firm, Counsel for plaintiff-appellants;

Stacy R. Obenhaus, Jeffrey S. Davis, Gardere, Wynne & Sewell, LLP Counsel for defendant-appellees;

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY THE COURTS

The opinion of the United States District Court from the Southern District of Texas, under docket number 4:01-CV-1377, was not reported and is therefore included in Appendix A of this petition. The opinion of the United States Court of Appeals, Fifth Circuit, under docket number 04-20463, was also not published and is included herein in Appendix B of this petition.

BASIS FOR JURISDICTION

Jurisdiction in the lower court was predicated upon diversity jurisdiction between the parties pursuant to 28 U.S.C. 1331. Jurisdiction of this Honorable Court relative to the pending petition for writ of certiorari is invoked pursuant to 28 U.S.C. 2101(C), as well as under 28 U.S.C. 1254. The judgment of the United States Court of Appeal, Fifth Circuit, was entered on December 15, 2004.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

GERALD CREDEUR AND LINDA CREDEUR
PETITIONERS

VERSUS

M J OIL, INC., TRANSTEXAS GAS CORPORATION

AND NABORS DRILLING U.S.A., INC.
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On August 14, 1999, plaintiff-appellant, Gerald Credeur (hereinafter referred to as "Credeur"), was employed by Newpark Drilling Fluids and assigned to monitor the drilling mud filtering equipment of Newpark on the "Sheldon 1-R", a land-based drilling rig located in Smith Point, Texas. Defendant-appellee, Nabors Drilling U.S.A., Inc. (hereinafter referred to as "Nabors") owned and built the drilling rig in

question and defendant-appellee, TransTexas Gas Corporation (hereinafter referred to as "TransTexas") was the operator of the well being drilled and the mineral lease holder. In performing his job duties, Credeur had to transit from one level of the referenced drilling rig to another level utilizing a step which was located on top of a metal grating hatchway in grating floor of the drilling rig directly above the drilling mud tanks. This hatchway was utilized by employees of the defendant-appellees to gain access to the open top drilling mud tanks below. In fact, employees of the defendant-appellees accessed these tanks only days prior to the accident in question through this hatch.

On the above date, Credeur was attempting to transit from the higher level of the drilling rig to the lower level via the referenced step on the hatchway when, suddenly and without warning, the hatchway gave way under him, causing Mr. Credeur to violently fall partially through the hatchway. Mr. Credeur was able to break his fall by catching the hatchway opening with his arms. However, he sustained serious lumbar injuries at the L5-S1 and L4-5 levels. He also required arthroscopic surgery to his left knee and is unable to return to work due to a sixty-one per cent whole body disability rating.

The failure of the hatch in question was caused by a combination of exposure of the metal components of the hinges to the caustic drilling muds and the defective design and construction of same in that the hatch was not supported by any surrounding structure. In other words, the hatch was held in position only by its hinges, which catastrophically failed due to severe corrosion.

The Credeurs filed suit in the U. S. District Court for the Southern District of Texas, Houston Division, against TransTexas (formerly MJ Oil, Inc.) and Nabors on April 25,

2001 alleging defective design and construction of the hatch and hatchway in question, negligence in maintenance of the work premises under their control, defects in the premises owned/operated by the defendants which they knew or should have known about, negligent inspection of the premises under their control and res ipsa loquitor as grounds of recovery. TransTexas and Nabors eventually responded by filing a joint motion for summary judgment on January 30, 2004 alleging that they did not owe the plaintiff any duty and Credeur could not demonstrate actual knowledge of the defective hatch on the part of the defendants. On April 12, 2004 the Trial Court below granted the defendant's motion for summary judgment under Chapter 95 of the Texas Civil Practice and Remedies Code and the Credeurs filed a motion for rehearing, which was eventually denied by order entered on May 12, 2004. On May 21, 2004 the plaintiff-appellants entered a notice of appeal of these decisions to the United States Court of Appeals, Fifth Circuit. On December 15, 2004 the Court of Appeals entered its decision affirming the District Court decision citing a lack of actual knowledge on the part of the defendant-appellees of the defective nature of the hatch in question. Plaintiff-appellants herein have filed the instant application for writs of certiorari to this Honorable Court to review the correctness of these decisions given the import of same on the law of premises liability, common law negligence and product liability.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals, Fifth Circuit, has erroneously extended the scope of protection of the provisions of Chapter 95 of the Texas Civil Practice and Remedies Code to a non-property owner (Nabors) contrary to the intent of said statute and the interpretations of same by Texas courts, the result of

which justifies the exercise of this Court's supervisory powers to prevent manifest injustice.

2. The decision of the United States Court of Appeals, Fifth Circuit, erroneously expands the scope of what constitutes construction, repair, renovation or modification for purposes of interpreting Chapter 95 of the Texas Civil Practices and Remedies Code, thus eradicating the plaintiff-appellants' common law premises liability rights and remedies available under established product liability law in the United States.

ARGUMENT

Erroneously ignored by the Honorable Trial Court and U.S. Court of Appeals, Fifth Circuit, below is the applicability of Chapter 95 to the defendant-appellee, *Nabors Drilling U.S.A., Inc.* Chapter 95.003, et seq. of the Texas Civil Practice and Remedies Code provides that:

> "A **property owner** is not liable for the personal injury, death, or property damage to a contractor, subcontractor, or an employee of a subcontractor who **constructs, repairs, renovates, or modifies** an improvement to real property, including personal injury, death or property damages arising from the failure to provide a safe workplace unless: the property owner exercises some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and the property owner had actual knowledge of the danger or condition resulting in the personal injury, death or property damage and failed to adequately warn." (emphasis supplied)

Thus, this statute makes it clear that its provisions apply only to a "property owner". That term is defined in Chapter 95 as being a person or entity that owns real property. While the case of *Francis v. Coastal Oil & Gas Corp.*, 130 S.W. 3d 76, Tex. App., 2003 has interpreted this provision to include the mineral lease holder (TransTexas), it is clear that in the instant matter Nabors, as the driller, would not have the protections of Chapter 95 available to it, even under the interpretation of Chapter 95 set forth under *Francis*. Nabors was in no way a "property owner" under any existing interpretation of Chapter 95. Accordingly, it is clear, that at least as to Nabors, the ordinary negligence standard of premises liability would apply and thus, constructive knowledge of the defective condition is sufficient. This, the plaintiffs have amply demonstrated through the ownership of the drilling rig, the degree of corrosion of the hatch and its hinges, as well as the actual knowledge acquired by Nabors' employees in accessing the hatch only days before the accident. This was and is a material issue of fact in dispute which the plaintiff-appellants clearly demonstrated and which should have negated the grant of summary judgment in the trial court below, at least as to defendant-appellee, Nabors.

The Honorable Court of Appeals, Fifth Circuit, below erroneously failed to find in favor of the plaintiff-appellants herein as to Nabors Drilling Co., alleging that plaintiff-appellants had only for the first time on appeal urged that Nabors was not entitled to the protections of Chapter 95. This is patently erroneous, as the plaintiff-appellants urged in the trial court below that Chapter 95 was inapplicable to both Nabors and TransTexas in the instant fact situation, both at the hearing on the summary judgment, as well as on application for re-hearing. Furthermore, this argument totally ignores the basic precept that in reviewing a grant of summa-

ry judgment at the trial level federal courts of appeal review same *de novo.* See: *B.P. Oil International, Ltd. v. Empresa Estatal Petroleos de Equador,* 332 F. 3d 333, C.A., 5th Cir., 2003.

The above-referenced rulings by the trial court and court of appeal erroneously expand the scope of coverage of the protections of Chapter 95 to entities which were never intended to have these protections, imposing upon the plaintiff-appellants herein a grave miscarriage of justice. This is especially onerous in the instant matter given that the ownership and operation of the drilling rig in question by defendant-appellee, Nabors, was acknowledged by the trial court below. The hatch in question was an integral part of this drilling rig, which Nabors designed and constructed itself. The defendant-appellees admitted in pre-trial discovery to having inspected this rig at least twice prior to the instant accident. The sudden and catastrophic failure of this hatch was clearly a situation which at the very least called for the application of res ipsa loquitor, an issue never addressed by the courts below. This, combined with the information provided to plaintiff by Nabors that it intended to change out the hatch/hinge assembly after the present well was drilled certainly is material evidence of actual knowledge on the part of Nabors of the condition of the hatch, if not certainly constructive knowledge of same.

The plaintiffs have clearly pleaded defective design of the hatch and hatchway, negligence of the defendant-appellees in the maintenance of the premises under their control, defects in the premises owned/operated by the defendant-appellees which they knew or should have known about, negligent inspection and correction of the premises by the defendant-appellees. It is respectfully submitted that the plaintiff-appellees amply demonstrated the requisite facts and legal

authority to defeat the motion for summary judgment filed by TransTexas and Nabors and thus, the granting of the motion for summary judgment was patent error by the Trial Court below, as well as error on the part of the Court of Appeals, Fifth Circuit, in not reviewing same *de novo* and reversing the ruling of the Trial Court.

As this Honorable Court knows, the mover in a summary judgment action must demonstrate that there is no genuine issue of material fact unresolved by the pending motion and that the mover is entitled to judgment as a matter of law. See: *Celotex Corp. v. Catrett*, 477 U.S. 317, 1986. The moving party in a motion for summary judgment bears the burden of establishing the above, as well as an absence of evidence to support the non-moving party's case. See: *Celotex Corp. v. Catrett,* supra; Rule 56, Federal Rules of Civil Procedure.

Secondly, summary judgment is an extreme remedy which is not to be entered unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances. See: *Brunswick Corp. v. Vineberg,* 370 F. 2d 605, C.A. 5th Cir., 1967. The purpose of summary judgment is not to cut off a litigant's right to trial by jury and is only appropriate where the documents and evidence before the court indicate that no genuine issue of material fact remains unresolved. See: *U. S. v. Burket,* 402 F. 2d 426, C.A. 5th Cir, 1968. In deciding whether there is a material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true and every reasonable inference must be indulged in favor of the non-movant, any doubts being resolved in favor of denying the motion. See: *Mata v. Brooks Petroleum Co.*, 2003 WL 1922851, Ct. App., Tyler, 2003;

Hughes Wood Products, Inc. v. Wagner, 18 S. W. 3d 202, Tex. 2000.

The defendant-appellees urged in their memorandum in support of their pending motion, and the courts below agreed, that Chapter 95 of the Texas Civil Practice and Remedies Code provided the exclusive remedy for the plaintiff-appellants in this action. It is respectfully submitted that this is patent error. As previously noted, Section 95.003 of the Texas Civil Practice and Remedies Code provides that:

> "A **property owner** is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a subcontractor who **constructs, repairs, renovates, or modifies** an improvement to real property, including personal injury, death, or property damages arising from the failure to provide a safe workplace unless: the property owner exercises or retains *some* control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive report; and the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn." (emphasis supplied)

The plaintiff herein, Gerald Credeur, was an employee of Newpark Process Services, who was on the premises of the defendant-appellees in order to perform filtering of the drilling mud. Mr. Credeur's job did not in any way involve **any** construction, repair, renovation or modification of the drilling rig owned/operated by the defendants. Nor have TransTexas or Nabors alleged that the plaintiff-appellant, Credeur, was in any way engaged in such construction, repair, renovation or modification of the drilling rig premises.

Additionally, the defendant-appellees did not attach to or reference any evidence they possess to the contrary. Accordingly, Chapter 95 does not provide the remedy or standard of proof required for the plaintiff-appellants' instant action, or at the least, a material issue of law and fact exists which was unresolved by the motion for summary judgment, thereby rendering the grant of summary judgment erroneous.

The Court of Appeals, Fifth Circuit, apparently relied upon the case of *Francis v. Coastal Oil & Gas Corp.*, 130 S. W. 3d 76, Tex. App., 2003 for authority that ".....Mr. Credeur's activity fit within this requirement (construction, repair, renovation or modification) of Chapter 95, because Newpark was hired to filter mud, which was in turn used in drilling....." This was patent error on the part of the Court of Appeals and leads, again, to an expansion of the protections of Chapter 95 to persons and entities never intended by the Texas legislature to have same. In *Francis,* the court was presented with a situation where the plaintiff, an employee of a sub-contractor hired by the drilling company, was injured while cleaning out coiled tubing on the drilling stems of the well. The court in Francis held that the activity of cleaning the drilling stems of the well qualified as repair, renovation or modification of the well, giving to Coastal the protections of Chapter 95.

It is respectfully submitted that the activities of Credeur in monitoring the drilling mud filters on mobile equipment owned by his employer does not place his activities in the realm of construction, repair, renovation or modification of the drilling well in the instant matter. Credeur's activities only involved changing the filters on the mobile drilling mud equipment provided to filter the drilling mud on the well in question. This equipment was totally mobile and Credeur's activities did not involve changing any equipment, modifying

any equipment or repairing any equipment of the drilling rig itself. Accordingly, *Francis* is not authority for the proposition proffered by the Court of Appeal below and it was patent error for the Court of Appeal to, in effect, expand the ambit of Chapter 95's protections to activities for which the statute was never intended.

Given the paucity of definitive interpretative jurisprudence from the Texas Supreme Court on the issues presented herein as to the interpretation of Chapter 95, it is respectfully submitted that the Court of Appeals, Fifth Circuit, should have certified the questions presented herein to the Texas Supreme Court for guidance on the scope of Chapter 95's applicability. In the absence of this, the plaintiff-appellants are effectively left only with the pending application for writs of certiorari to this Honorable Court to address the miscarriage of justice resulting from the unjustified expansions of the applicability of Chapter 95 resulting from the decision by the court of appeal herein.

CONCLUSION

In conclusion, the plaintiff-appellants herein have amply demonstrated that there are material issues of fact existing in this matter which make a determination of the issues inappropriate for disposition under summary judgment and the courts below committed error in so granting the motion. The decision of the Court of Appeals, Fifth Circuit, has erroneously expanded the scope of protection of the provisions of Chapter 95 of the Texas Civil Practices and Remedies Code to a non-property owner contrary to the plain language and intent of this statute. Furthermore, the decision of the court of appeals below erroneously expands the scope of what constitutes construction, repair, renovation or modification of property for purposes of Chapter 95, thereby totally negating

the rights and remedies otherwise available to the plaintiff-appellants.

It is respectfully submitted that this Honorable Court should grant the pending writ application and review the issues submitted herein in order to prevent manifest injustice to the plaintiff-appellants resulting from the decision of the Court of Appeals, Fifth Circuit. At the very least, it is respectfully submitted that this Honorable Court should grant the pending writ for purposes of ordering that the Court of Appeals, Fifth Circuit, certify the questions presented herein to the Texas Supreme Court for definitive guidance on the applicability of Chapter 95 to the instant facts.

Respectfully submitted:

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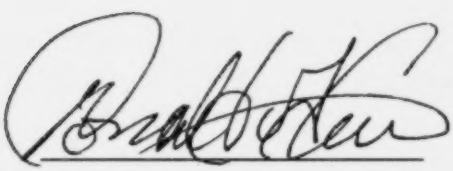


Donald G. Cave, #4073
Counsel for Plaintiff-appellants

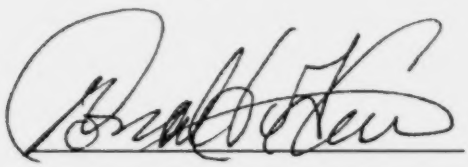
CERTIFICATE

I hereby certify that copies of the above and foregoing application for writs of certiorari have this date been forwarded to the below-listed interested parties, or their counsel of record, at the addresses listed herein:

Mr. Stacy R. Obenhaus
Attorney at Law
1000 Louisiana
Suite 3400
Houston, TX 77002

Mr. Jeffrey S. Davis
Attorney at Law
1000 Louisiana
Suite 3400
Houston, TX 77002

Baton Rouge, Louisiana this 14th day of March, 2005.



Donald G. Cave
Attorney for Plaintiff-appellants

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

GERALD CREDEUR
& LINDA CREDEUR,
Plaintiffs,
v.
MJ OIL, INC.,
D/B/A/TRANSTEXAS
GAS CORPORATION
& NABORS DRILLING
U.S.A., INC.,
Defendants.

UNITED STATES COURTS
SOUTHERN DISTRICT OF
TEXAS
ENTERED
APR 13, 2004
MICHAEL N. MILBY,
CLERK OF COURT
CIVIL ACTION
NO. H-01-1377

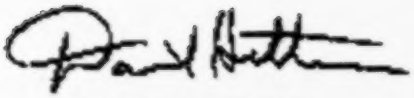
ORDER

As the Court has granted Defendants TransTexas Gas Corporation and Nabors Drilling U.S.A., Inc.'s Motion for Summary Judgment (Instrument No.59), the Court hereby

ORDERS that final judgment be entered in favor of Defendants. Plaintiffs Gerald Credeur and Linda Credeur's claims against Defendants are DISMISSED. Plaintiffs shall take nothing from Defendants.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, on this 12 day of April, 2004.



DAVID HITTNER

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

GERALD CREDEUR
& LINDA CREDEUR,
Plaintiffs,

v.

MJ OIL, INC.,
D/B/A/TRANSTEXAS
GAS CORPORATION &
NABORS DRILLING
U.S.A., INC.,
Defendants.

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 1 3 2004
MICHAEL N. MILBY, CLERK OF COURT

CIVIL ACTION
NO. H-OL-1377

ORDER

Pending before the Court is the Motion for Summary Judgment filed by TransTexas Gas Corporation and Nabors Drilling U.S.A., Inc. (Instrument No. 59). Having considered the motion, submissions, and applicable law, the Court determines that the motion should be granted.

BACKGROUND

On April 26, 2001, Plaintiffs Gerald and Linda Credeur filed this action against TransTexas Gas Corporation ("TransTexas") and Nabors Drilling U.S.A., Inc. ("Nabors") for personal injuries allegedly suffered by Geraid Credeur ("Credeur") while working on the Sheldon 1-R, an oil and gas well located in the Smith Point field in Chambers County, Texas. Specifically, Credeur contends that, as he stepped

down on a metal grating that covered the mud tank, the grating gave way causing him to partially fall into the mud tank and resulting in personal injuries. Therefore, Plaintiffs are suing Defendants for premises liability, gross negligence, and reckless disregard for safety based on Defendants': (1) failure to inspect and repair the well; (2) failure to provide a safe workplace; (3) failure to warn workers of a hazardous condition; (4) failure to inspect and repair; and (5) allowing an ultrahazardous condition to exist and go unrepaired. Plaintiffs allege Defendants knew this condition existed and did nothing to correct it, which entitles them to exemplary damages. Gerald Credeur states his injuries and damages include: severe pain, suffering, anguish, anterior spinal column failure, lumbar injuries, injuries to his left leg, including cuts, bruises, and scarring, loss of sleep, lost wages, and healthcare expenses. In addition, Gerald's wife, Linda Credeur, requests damages for loss of consortium and lost marital relations, including loss of service, society, companionship, love and affection.

Defendant TransTexas was the operator of the Sheldon 1-R well. TransTexas contracted with Defendant Nabors to drill the well.[1] TransTexas also contracted with Newpark Drilling Fluids ("Newpark") to perform certain services on the well. Credeur was employed as a sit-hand for Newpark and was responsible for operating and maintaining the Newpark equipment on the well, which was situated adjacent to the mud tanks owned by Nabors.[2] On August 14, 1999, Credeur alleges that he descended from a mud cleaner located above Nabor's mud tank and landed on a step that was positioned on top of a grating hatch located over the mud tank. Credeur

[1]Nabors owned and operated the drilling rig, Nabors Rig 393.

[2]Neither party specified what Credeur's actual duties for Newpark entailed.

alleges his weight caused the grating hatch to collapse, and he partially fell into the mud tank. Credeur claims the grate was designed as a hatch to allow access to the mud tank, and the hinges used to allow this access failed, causing the step to collapse. Thus, Credeur alleges the defect in the grating hatch hinges caused his injuries, and, as a result, Credeur suffers from a percentage of permanent disability.

On January 30, 2004, Defendants filed the instant motion for summary judgment arguing: (1) chapter 95 of the Texas Civil Practice and Remedies Code provides Plaintiffs' exclusive remedy and precludes Plaintiffs' negligence claims, (2) Plaintiffs cannot meet the statutory elements of premises liability as set forth in chapter 95, (3) Plaintiffs cannot establish the common law elements of premises liability, and (4) Plaintiffs' gross negligence claim fails because there is no evidence of conscious disregard for Credeur's safety.

On February 18, 2004, Plaintiffs responded that statutory premises liability is inapplicable in this action because Credeur does not fall within the guise of the statute. Next, Plaintiffs argue Defendants are liable under negligent activity and negligent design claims. Plaintiffs contend they are suing for defective design of the hatch, negligence in maintenance of the premises, defects in the premises, which Defendants knew or should have known about, and negligent inspection and correction of premises defects. The Court will address each parties' summary judgment arguments and responses in turn.

STANDARD OF REVIEW

Summary judgment is proper when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court must view the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113

F.3d 528, 533 (5th Cir. 1997). Initially, the movant bears the burden of presenting the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The burden then shifts to the non-movant to come "forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,586-87 (1986) (quoting Fed. R. Civ.P. 56(e)). "A dispute about a material fact is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Bodenheimer v. PPG Indus., Inc.,* 5 F.3d 955,956 (5th Cir. 1993) (citation omitted). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). Conclusory allegations unsupported by specific facts will not prevent an award of summary judgment; the plaintiff cannot rest on his allegations to get to a jury without any significant probative evidence tending to support the complaint. *E.g., Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd.*, 40 F.3d 698, 713 (5th Cir. 1994). Thus, the non-movant's burden cannot be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). It is not the function of the court to search the record on the non-movant's behalf for evidence which may raise a fact issue. *Topalian v. Ehrman,* 954 F.2d 1125, 1137 n.30 (5th Cir. 1992).

LAW AND ANALYSIS

A. Statutory Premises Liability

A property owner is free from premises liability "for personal injury, death, or property damage to a contractor, sub-

contractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace." TEX. CIV. PRAC. & REM. CODE § 95.003 (Vernon 1997). However, a property owner will be found liable if he "exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports" and "had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn." *Id.* Both conditions must be met before liability will be imposed upon a property owner. *See Kelly v. LIN Television,* 27 S.W.3d 564, 567 (Tex. App.-Eastland 2000, pet. denied). Further, "failure to provide a safe workplace" means the plaintiff's injuries must relate to work being done by the plaintiff, but the injury-producing defect need not be the object of the plaintiff's work. *See Fisher v. Lee & Chang P'ship,* 16 S.W.3d 198, 202 (Tex. App.-Houston [1st Dist.] 2000, pet. denied).

Defendants argue that Plaintiffs' negligence claims are based on premises liability and failure to provide a safe workplace. Therefore, Defendants assert that section 95.003 of the Texas Civil Practice and Remedies Code is applicable. Moreover, Defendants contend that section 95.003 has previously been applied in the oilfield context and is the exclusive remedy for employees of independent contractors against premises owners. *See Francis v. Coastal Oil & Gas Corp.,* No. 01-01-00457-CV, 2003 WL 21233564, at *9 (Tex. App.-Houston [1st Dist.] 2003, no pet. h.) (indicating not yet designated for publication).

In contrast, Plaintiffs contend that section 95.003 is inapplicable because Credeur's job did not involve construction,

repair, renovation, or modification of the drilling rig owned and operated by the Defendants. Instead, Plaintiffs argue Credeur was an employee of Newpark, who was on the Defendants' premises in order to perform mud filtering of the drilling mud.

In *Francis,* the plaintiff, an employee of an independent contractor who was performing a coiled-tubing washout on the well, sustained serious injuries in an explosion that occurred on Defendant Coastal's premises. *See Francis*, No. 01-01-00457-CV, 2003 WL 21233564, at *1,2. Coastal owned and operated the well and held the mineral leases. *Id.* at *1. Coastal subcontracted with Reeled Tubing, Francis' employer, to perform work at the well site. *Id.* During trial, Francis submitted his case against Coastal and several other defendants to the jury based on chapter 95 of the Texas Civil Practice and Remedies Code, common law negligence, and premises liability. *Id.* at *3. The jury responded to the common law negligence and premises liability questions, but not the statutory liability. *Id.* However, the trial court set aside the jury's verdict and rendered judgment in favor of Defendants indicating that chapter 95 was dispositive of the issues. *Id.* The Court of Appeals agreed and held "chapter 95 controls this case, is Francis' exclusive remedy against Coastal, and precludes common-law negligence liability in Coastal" because Coastal, via its leases and mineral rights, is a property owner, Francis sued Coastal for damages caused by negligence, and Francis claimed personal injuries arising from an improvement to real property, namely the well Francis was working on. *Id.* at *4, *9.

In the instant case, the Court determines that section 95.003 is applicable because TransTexas is a property owner in that it is a lessee and operates the well. The Sheldon 1-R well itself is considered an improvement to real property.

Credeur is a subcontractor who suffered personal injuries. Further, like the plaintiff in *Francis*, Credeur assisted in the active drilling of this well by filtering the mud so that it could be injected back into the well to facilitate further drilling. Arguably, this work qualifies as an ongoing repair, renovation or modification of the Sheldon 1-R well.

In the alternative, Plaintiffs argue that even if section 95.003 applies, Plaintiffs have made a prima facie showing that Defendants did exercise some degree of actual control over the performance of Credeur's job duties. A premises owner may exercise control over an independent contractor's work in one of two ways, either contractually or by actual control. *Dow Chem. Co. v. Bright,* 89 S.W.3d 602, 606 (Tex. 2002). For liability to attach under the control theory, the right of control must be "more than the right to order the work to start or stop or to inspect progress or receive reports." TEX. CIV. PRAC. & REM. CODE § 95.003(1). Furthermore, the exercise of control must relate to the activity that caused the injury. *Dow Chem. Co.,* 89 S.W.3d at 607.

Here, Plaintiffs contend this was actual, not contractual, control because TransTexas' company man ordered changes of equipment owned by Newpark, directed changes be made in the type and density of filters on the Newpark equipment, ordered changes in the types of muds being used, and ordered and timed the removal of muds from the drilling site that were stored in trucks owned by Newpark. Plaintiffs assert this degree of control goes well-beyond the right to order work to stop or start or to inspect the work or receive progress reports. *See id.* at 606. Accordingly, Plaintiffs contend they have satisfied the requirements of section 95.003.

In contrast, Defendants maintain that to be liable under section 95.003, Plaintiffs must show control *and* actual knowledge of the alleged condition. *See* TEX. CIV. PRAC. &

REM. CODE § 95.003(1)-(2). With respect to control, Defendants must control the "means, methods, or details of the independent contractor's work." *Dow Chem. Co.,* 89 S. W.3 d at 602. Here, Defendants argue they did not exercise or retain control over the work being performed by Newpark, the independent contractor, or Newpark's employees. Despite Plaintiffs' allegations that Defendants retained control over Credeur's work, Credeur testified at his deposition that neither TransTexas nor Nabors provided any specific instructions to him regarding his work. Additionally, there was no contractual agreement that governed the right to control in this case. Because the evidence is conflicting regarding right to control, the Court determines that it will resolve any doubt concerning the right to control in favor of the Plaintiff.

In addition to establishing a right of control under section 95.003, Plaintiffs must also establish actual knowledge by the Defendants of the alleged dangerous condition. *See* TEX. CIV. PRAC. & REM. CODE § 95.003. Here, Plaintiffs concede in their memorandum in opposition to Defendants' motion for summary judgment that they are unable to establish actual knowledge on Defendants' part. Thus, summary judgment in favor of Defendants pursuant to section 95.003 is proper because Plaintiffs are unable to meet both statutory elements. Furthermore, because section 95.003 is an exclusive remedy, the Court determines that all of Plaintiffs' claims against Defendants fail. Notwithstanding this determination, the Court will address Defendants' and Plaintiffs' remaining summary judgment arguments.

B. Common Law Premises Liability

Aside from statutory premises liability, Plaintiffs also assert a cause of action for common law premises liability. In a common law premises defect case, Plaintiffs have the bur-

den of establishing (1) actual or constructive knowledge of some condition on Defendants' premises; (2) that the condition posed an unreasonable risk of harm; (3) Defendant did not exercise reasonable care to reduce or eliminate the risk; and (4) Defendants' failure to use such care proximately caused the Plaintiffs' injuries. *Dixon v. Wal-Mart Stores, Inc.*, 330 F.3d 311, 314 (5th Cir. 2003) (reciting Texas law on premises liability); *CMH Homes, Inc. v. Daenen,* 15 S.W.3d 97, 99 (Tex. 2000); *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 29 (Tex. App.-Tyler 2003, no pet. h.); *Beach Bait & Tackle, Inc. v. Bull,* 82 S.W.3d 663, 664-65 (Tex. App.-San Antonio 2002, no pet.); *Wyatt v. Furr's Supermarkets, Inc.*, 908 S.W.2d 266, 268 (Tex. App.-El Paso 1995, writ denied).

Plaintiffs argue that when a dangerous condition exists on the premises owned or operated by Defendants, the right of control is irrelevant because the contractor or operator must inspect the premises and warn third parties of dangerous conditions of which it knows or should have known. *See Shell Chem. Co. v. Lamb,* 493 S.W.2d 742, 746-47 (Tex. 1973); *Koko Motel, Inc. v. Mayo,* 91 S.W.3d 41, 46 (Tex. App.-Amarillo 2002, no pet.). In the instant case, Plaintiffs assert it is clear the drilling activity and associated use of drilling mud combined with the defective design and construction of the mud tank hatchway and hatch is the cause of Credeur's injuries. Plaintiffs provide expert testimony to support their contention that the hatch was corroding and weakened due to its exposure to caustic substances. However, in Plaintiffs' memorandum in opposition to Defendants' motion for summary judgment, Plaintiffs concede that they are unable to prove actual knowledge of the defective hatch and hinges, but state that it is readily apparent that the Defendants should have known of the defect.

In order to prove knowledge, Plaintiffs are not required to prove actual knowledge. See *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). Constructive knowledge of a defect may be inferred from the location of the defect or evidence of the circumstances of the defect manifesting itself. *See Dixon,* 330 F.3d at 315. "[T]he rule in Texas is that temporal evidence, not proximity evidence," is the key to a premises owner's constructive knowledge. *Id.* "To establish a premises owner's constructive knowledge of the presence of an unreasonable risk of harm, a plaintiff generally must prove that the risk existed for a time sufficiently long to permit the premises owner (or his employees) to (1) discover it and (2) correct it." *Id.* at 316.

Here, Plaintiffs rely on a constructive knowledge theory and urge Defendants had constructive knowledge of the defect by virtue of: (1) the nature of the environment the hatch and hinges were placed in, their location on the rig, and industry standards; (2) the fact Defendants designed and constructed the hatch without any supporting structure for the hatch and with defectively designed hinges; and (3) Defendants failed to timely and properly inspect this hatch and the hinges when they had a duty to do so. However, the Court determines these statements are no more than Plaintiffs' conclusory allegations. Plaintiffs failed to provide any evidence, either direct or circumstantial, to indicate Defendants had any knowledge-either actual or constructive-of the alleged defective hatchway. "A plaintiff has the obligation to produce the evidence that exists." *Wal-Mart Stores, Inc. v. Gonzalez,* 968 S.W.2d 934, 936 (Tex. 1998). An owner or occupier of land cannot breach a duty that it does not owe, and it does not owe a duty to correct an alleged dangerous condition of which it is not aware. *See Motel 6 G.P., Inc. v. Lopez,* 929 S.W.2d 1, 4 (Tex. 1996). Furthermore, in his

deposition, Credeur stated that he never had any actual or constructive knowledge that the grating hatch below the step was defective. In addition, Credeur testified that he had been up and down the steps several times that day without incident. Based on the foregoing, the Court determines that summary judgment in favor of Defendants is appropriate as Plaintiffs are unable to establish the essential elements of a common law premises liability cause of action.

C. Negligence and/or Gross Negligence

Again, assuming *arguendo* that chapter 95 is not dispositive, Plaintiffs allege a cause of action grounded in negligence. To establish a cause of action for negligence, Plaintiffs must show duty, breach, causation, and damages. *Villegas v. Texas Dept. of Transp. & REKCA, Inc.,* 120 S.W.3d 26, 39 (Tex. App.-San Antonio 2003, no pet. h.). The duty owed by a general contractor to its subcontractor's employees is that of an occupier of land to a business invitee. *Shell Chem. Co.,* 493 S.W.2d at 746. With respect to causation, Plaintiffs must show cause in fact and foreseeability. *Nixon v. Mr. PropertyMgmt. Co.,* 690 S.W.2d 546, 549 (Tex. 1985). Cause in fact is established if the negligent act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred. *Id.* Foreseeability, however, means that the actor, defendant, should have anticipated the dangers that his negligent act created for others. *Id.* at 549-50.

Here, Plaintiffs contend they are entitled to recover under the theory of res ipsa loquitur because negligence may be inferred from the mere fact that the accident occurred. *Jesionowski v. Boston & M.R.R.,* 329 U.S. 452, 457 (1947); *Tex. & Pac. Ry. Co. v. Buckles,* 232 F.2d 257, 263 n.15 (5th Cir. 1956). When using this theory, Plaintiffs must show the causes of the injury were under the management and control

of the Defendants. *See Poplar v. Dillard's Dept. Stores, Inc.*, No. 03-CA-1023,2003 WL 23025446, at *1 (5th Cir. Dec. 30, 2003); *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245,251 (Tex. 1974). Plaintiffs argue Defendants were in control of the drilling rig at all times, Defendants had a duty to inspect the hatch and hatchway, and the circumstances of the accident indicate that it is not one that would occur without negligence. Plaintiffs also contend that the defective hatch posed an unreasonable risk of harm and a reasonably prudent person could have foreseen this accident. Plaintiffs argue that Defendants' failure to exercise reasonable care to eliminate the foreseeable risk in this case was the proximate cause of Credeur's injuries. Plaintiffs further argue that a reasonable inspection would have revealed this defect. Plaintiffs assert that Defendants' negligent acts were a substantial factor in bringing about the injury and, without which, the injury would not have occurred. *See Leitch v. Hornsby,* 935 S.W.2d 114, 118-19 (Tex. 1996); *Plainview Motels, Inc.,* 127 S.W.3d at 32.

In response, Defendants contend that res ipsa loquitur does not apply because the evidence does not support the application of that doctrine. The Court agrees because Plaintiffs neither established that the hatch was under the management and control of Defendants at all times, nor provided any evidence of such.

Next, Defendants argue that this is not a negligent activity case. To be a negligent activity case, the plaintiffs injuries must be directly related to the activity itself. *Stanley Stores, Inc. v. Veazey,* 838 S.W.2d 884, 886 (Tex. App.-Beaumont 1992, writ denied). If the plaintiff was injured by a condition created by the activity rather than by the activity itself, then the plaintiff is limited to the premises defect theory of recovery. *Keetch*, 845 S.W.2d at 264. It is not sufficient to invoke

the negligent activity theory that the injury occurred contemporaneously with the activity; there must be a direct relationship to the activity. *Id.* For example, the Texas Supreme Court reversed and rendered a jury verdict in favor of an independent contractor's employee who fell on an oil rig location because the plaintiff submitted the case to the jury as a negligent activity case when the accident was the result of a premises defect. *Clayton W. Williams, Jr., Inc. v. Olivo,* 952 S.W.2d 523, 526, 528-30 (Tex. 1997). The Court agrees with Defendants' analysis of the case. Credeur's injury on the hatchway step was unrelated to his activity of working as a sit-hand on the Sheldon 1-R, performing the mud filtration, or the actual drilling of the well itself. Further, the condition of the hatchway step is a result of activity on the Sheldon 1-R well, which also lends towards utilizing a premises defect theory.

Again, Defendants argue that Plaintiffs' attempts to plead this case as a negligent design cause of action are unsuccessful because Plaintiffs have no evidence of any negligence in this case. Moreover, Plaintiffs' expert testified at his deposition that the design of the hinges does not breach industry standards. Plaintiffs presented no other evidence with respect to this claim. The Court concurs with Defendants' arguments regarding negligence. Plaintiffs have not shown that Defendants' breached any duty toward Gerald Credeur because Plaintiffs did not establish that Defendants knew of the alleged defective hatch or that a reasonable inspection would have revealed any problems with the hatch. Plaintiffs' own expert stated the hatch was not defectively designed. Accordingly, summary judgment in favor of Defendants on Plaintiffs' negligence claims is proper.

Defendants also moved for summary judgment with respect to any gross negligence claims raised by Plaintiffs.

Plaintiffs did not address this issue in their response to Defendants' motion for summary judgment. Therefore, pursuant to local rule, failure to respond is taken as a representation of no opposition. S.D. TEX. LOCAL R. 7.4. However failure to respond is not conclusive, Defendants must still show they are entitled to summary judgment. *E.g., John v. La. Bd. of Trs. for State Colls. & Univs.,* 757 F.2d 698, 709 (5th Cir. 1985).

To recover for gross negligence, Plaintiffs must show by clear and convincing evidence: (1) a specific intent by Defendants to cause substantial injury to Plaintiffs; (2) an act or omission by Defendants: (a) which when viewed objectively from the standpoint of Defendants at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (b) of which Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.001(11), 41.003(a)(3) & (b) (Vernon 1996); *see also Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 21-22 (Tex. 1994). Evidence of simple negligence is not enough. *Love v. CF&H Corp.*, 89 S.W.3d 68,72 (Tex. App.-El Paso 2002, pet. denied). Defendants had to know there was a risk of harm to others and acted with conscious indifference in disregarding that risk. *Id.*

In the captioned matter, Plaintiffs' expert witness testified at his deposition that he was unaware of any evidence that Defendants proceeded with conscious disregard to the safety of others regarding the allegedly defective grating. Plaintiffs presented no other evidence and did not respond concerning this issue. Because there is no clear and convincing evidence regarding gross neligence on Defendants' part, summary

judgment in favor of Defendants is appropriate. Based on the foregoing, the Court hereby

ORDERS that the Motion for Summary Judgment filed by TransTexas Gas Corporation and Nabors Drilling U.S.A., Inc. (Instrument No. 59) is GRANTED.

SIGNED at Houston, Texas, on this 12 day of April, 2004.

DAVID HITTNER

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No, 04-20463

SUMMARY CALENDAR

FILED
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
December 15, 2004
Charles R. Fulbruge III
Clerk

GERALD CREDEUR; LINDA CREDEUR,
Plaintiffs-Appellants,

versus

MJ OIL INC., doing business as
TransTexas Gas Corp., ET AL.;
Defendants,

NABORS DRILLING USA, INC.;
TRANS TEXAS GAS CORP.
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(4:01-CV-1377)

Before JONES, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:*

Gerald and Linda Credeur (Credeur) appeal the summary judgment against their claims against TransTexas Gas Corporation and Nabors Drilling U.S.A., Inc. Credeur contends TransTexas and Nabors do not fall within the protections of Chapter 95 of the Texas Civil Practices and Remedies Code (Chapter 95) and are liable under theories of common law premises liability and gross negligence for Mr. Credeur's injuries. Alternatively, Credeur maintains that, if TransTexas and Nabors are eligible for Chapter 95 protection, Credeur nonetheless meets the requirements for imposition of liability under that statute.

TransTexas owned and operated an oil and gas well in Texas; it contracted with Nabors to drill the well. TransTexas also contracted with Newpark Drilling Fluids to perform certain services on the well, including mud filtration. Mr. Credeur was employed by Newpark and was responsible for operating and maintaining the Newpark equipment on the well. That equipment was located next to mud tanks owned by Nabors. Mr. Credeur was injured when he partially fell through a grating hatch accessing Nabors' mud tank, after stepping from a mud cleaner located above the mud tanks onto a step positioned on top of the hatch. Credeur claims the grating hatch hinges failed. Credeur brought claims against TransTexas and Nabors to recover for personal injuries.

TransTexas and Nabors moved for summary judgment, claiming: Chapter 95 provides Credeur's exclusive remedy

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and precludes his common-law negligence claims; Credeur cannot meet the statutory elements of premises liability under Chapter 95; Credeur cannot establish a common law premises liability claim; and Credeur's gross negligence claim fails because there is no evidence of conscious disregard for Mr. Credeur's safety. In granting summary judgment, the district court ruled: Chapter 95 provides Credeur's exclusive remedy; and Credeur did not establish TransTexas' and Nabors' liability under that statute.

Credeur filed a motion for relief from judgment within ten days after judgment. *See* FED. R. CIV. P. 59(b). The original filing was stricken from the record, however, because it did not conform to local filing rules. The corrected motion was filed outside the ten-day window, and is therefore treated as a motion under FED. R. CIV. P. 60. The district court denied the motion. The district court's striking the nonconforming motion was a final action for purposes of FED. R. APP. P. 4(a)(4)(A)(v) and (vi), so that the time to file a notice of appeal began on the date the non-conforming motion was stricken. We have jurisdiction because the notice of appeal was timely filed from that final action.

"This court reviews grants or denials of summary judgment *de novo*, applying the same legal standards as the district court." *Mayo v. Hartford Life Ins. Co.,* 354 F.3d 400, 403 (5th Cir. 2004). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law". FED. R. CIV. B. 56(c). The court views the evidence in the light most favorable to the nonmovant, *Coleman v. Houston Indep. Sch. Dist.,* 113 F.3d-528, 533 (5th Cir. 1997), but conclusory allegations unsupported by specific facts will not prevent summary judgment, *Doe v. Dallas Indep. Sch. Dist.,* 153 F.3d 211, 215 (5th Cir, 1998), *cert. denied,* 531 U.S. 1073 (2001).

Chapter 95 applies to a claim against a property owner, contractor, or subcontractor for personal injuries, when that claim arises from the condition or use of an improvement to real property, where the contractor or subcontractor's employee constructs, repairs, renovates, or modifies the improvement. TEX. CIV. PRAC. & REM. CODE § 95.002. Liability is imposed under Chapter 95 only if: (1) the property owner exercises or retains some control over the manner in which the plaintiff's work is performed; *and* (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury and failed to adequately warn. TEX. CIV. PRAC. & REM. CODE § 95.003; *Francis v. Coastal Oil & Gas Co.,* 130 S.W.3d 76, 83 (Tex. App. Houston 1 Dist. 2003); see also *Kelly v. LIN Television,* 27 S.W.3d 564, 567 (Tex.App.-Eastland 2000, pet. denied).

For the first time on appeal, Credeur contends Chapter 95 does not apply to his claims against Nabors because it is not a property owner under Chapter 95. "Although on summary judgment the record is reviewed *de novo*, this court, for obvious reasons, will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion." *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915-16 (5th Cir.), *cert. denied;* 506 U.S. 832 (1992).

Credeur also maintains Chapter 95 does not apply because Mr. Credeur's work on the rig for Newpark was not construction, repair, renovation, or modification. Although the district court noted that neither party specified what Mr. Credeur's actual duties entailed, the district court decided that Mr. Credeur's activity fit within this requirement of Chapter 95, because Newpark was hired to filter mud, which was in turn used in drilling. For purposes of § 95.003, Texas courts have found that activity facilitating a well's perfor-

mance is construction, renovation, or modification. *See Francis*, 130 S.W.3d at 85. Mr. Credeur's actions qualify to invoke Chapter 95.

As discussed, for liability under Chapter 95, the property owner must retain some control over the injured party's work and must have actual knowledge of the conditions causing the injury. Credeur contends that TransTexas controlled Mr. Credeur's work when its employee ordered him to change equipment owned by Newpark; directed him to change the type and density of filters used; and scheduled mud-removal from the drill site. Viewing the facts in the requisite light most favorable to Credeur, the district court found Credeur could prove TransTexas had control over Mr. Credeur's actions. We agree.

For TransTexas and Nabors to incur liability under Chapter 95, however, they must *also* have had actual knowledge of the danger or condition resulting in Mr. Credeur's injuries. *See* TEX. CIV. PRAC. & REM. CODE § 95.003(2). Based on our review of the record, we find no evidence to support such knowledge. Accordingly, TransTexas and Nabors are protected from liability under Chapter 95. This statute is the sole basis for liability under these circumstances; therefore, Credeur's common law claims must fail.

AFFIRMED